No. 84-351 (4)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

ATASCADERO STATE HOSPITAL and CALIFORNIA DEPARTMENT OF MENTAL HEALTH,

Petitioners,

vs.

DOUGLAS JAMES SCANLON,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI
FILED AUGUST 31, 1984
PETITION GRANTED NOVEMBER 26, 1984

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 79 04523 MrP (Kx)

DOUGLAS JAMES SCANLON,

Plaintiff,

v.

ATASCADERO STATE HOSPITAL,
CALIFORNIA DEPARTMENT OF
MENTAL HEALTH,

Defendants.

INTRODUCTORY STATEMENT

1. Plaintiff DOUGLAS JAMES SCANLON brings this suit to remedy the unlawful actions taken against him by defendant ATASCADERO STATE HOSPITAL. Defendant refused to employ plaintiff SCANLON in a

salaried position as a graduate student assistant, a position which he had successfully performed as a volunteer, solely because of plaintiff's physical handicaps, diabetes mellitus and loss of sight in one eye. Plaintiff brings this action under the federal statutes prohibiting discrimination in employment on the basis of physical handicap by recipients of federal financial assistance, 29 U.S.C. § 794, and seeks monetary damages, employment and declaratory and injunctive relief, and attorney's fees and costs.

JURISDICTION

2. Jurisdiction of this action is conferred by

(a) 28 U.S.C. § 1331(a), as amended, this being an action wherein the matter in controversy exceeds the

sum or value of $10,000 exclusive of interest and costs, and arises under the laws of the United States;

(b) 28 U.S.C. § 1343(3) and (4), this being an action to redress the deprivation under color of state law of a right secured by an Act of Congress providing for equal rights and to recover damages and to secure equitable and other relief under an Act of Congress providing for protection of civil rights;

(c) 29 U.S.C. § 794 and 795, this being an action by an otherwise qualified handicapped individual who has been subjected to discrimination under a program receiving federal financial assistance;

(d) 28 U.S.C. §§ 2201 and 2202, this being a case of actual controversy

within the jurisdiction of the Court where the relief sought by plaintiff includes a declaration of the rights and other legal relations to the plaintiffs.

PARTIES

3. Plaintiff DOUGLAS JAMES SCANLON is a citizen of the United States and a resident of San Luis Obispo County, California. He was, at all times relevant, an undergraduate student in recreation administration at California Polytechnic Institute, San Luis Obispo. He is a physically handicapped individual as that term is defined in the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 706(6) and § 1413(h) of the Fair Employment Practices Act, California Labor Code § 1410 et seq. He is also a "qualified

handicapped individual" as defined by the relevant regulations implementing § 504 of the Rehabilitation Act with respect to recipients of federal financial assistance from HEW, 45 C.F.R. § 84.3(k)(1).

4. Defendant ATASCADERO STATE HOSPITAL is a public institution whose administrative offices are located in Atascadero in San Luis Obispo County. It is a recipient of federal financial assistance as defined by the relevant regulations, 45 C.F.R. § 84.3(f). It receives funds from the Department of Health, Education and Welfare. It is an employer as defined in § 1413(d) of the Fair Employment Practices Act and receives financial assistance for its program and activities from the State of California. It has authority to approve

or disapprove preemployment medical examinations.

5. Defendant DEPARTMENT OF MENTAL HEALTH and its predecessor Department of Health are statutorily established, duly appointed and acting agencies of the State of California. Department of Mental Health or its predecessor Department of Health at all times herein mentioned was the agency responsible for supervising and administering Atascadero State Hospital so that it complies with applicable provisions of federal and state law. It is a recipient of federal financial assistance as defined by the relevant regulations implementing § 504 of the Rehabilitation Act, 45 C.F.R. § 84.3(k)(1).

STATEMENT OF FACTS

6. Plaintiff has diabetes mellitus which has been stabilized by insulin therapy. Four years ago he developed diabetic retinopathy (hemorrhages of the retina). Three years ago the retinopathy was stabilized following laser treatment. Plaintiff has 20/25 vision in his left and no useable vision in his right eye. Plaintiff's physician certified that his diabetes is well-controlled and that he has no physical disabilities that would prevent him from working as graduate student assistant at Atascadero State Hospital.

7. During the spring of 1977, plaintiff worked as a volunteer recreation therapist at Atascadero State Hospital for approximately three months. His handicap in no way

interferred with the performance of his duties.

8. On February 6, 1978, plaintiff was interviewed by employees of defendant Atascadero State Hospital for a salaried half-time, nine-month position as a graduate student assistant. The position would have fulfilled academic requirements for graduation in plaintiff's recreation administration major at Cal Poly San Luis Obispo. The position would also have enabled plaintiff to terminate his dependency on Social Security Disability Insurance Benefits.

9. On or about February 6, 1978, Plaintiff was offered the position of graduate student assistant subject to passing a pre-employment physical examination.

10. Plaintiff underwent such an examination which was administered by a physician who Plaintiff believes to have been an employee of defendant ATASCADERO STATE HOSPITAL, on or about February 8, 1978. Plaintiff was not informed prior to the examination that his blood sugar level would be tested and therefore had not fasted for several hours before the test, as established medical procedure requires. During the examination the physician told plaintiff that he would recommend against hiring him because the liability for any damage to his remaining eye would fall on the state.

11. In February 1978, plaintiff was informed by defendant ATASCADERO STATE HOSPITAL that he had failed the physical examination. By letter dated March 31, 1978, defendant ATASCADERO informed

plaintiff that it was unable to hire him because of uncontrolled diabetes and lack of vision in one eye. The same letter stated that plaintiff's record had been forwarded to Dr. McGahey, Medical Officer of the State Personnel Board for review.

STATUTORY SCHEME

12. Section 504 of the Rehabilitation Act of 1973, as amended, 20 U.S.C. § 794, bans discrimination against qualified handicapped individuals on the basis of their handicap, under any program or activity receiving federal financial assistance.

13. Section 505 of the Rehabilitation Act of 1973 as amended, 29 U.S.C. § 795 (P.L. 97-602) provides for enforcement of rights articulated in Section 504.

14. Section 1412 of the California Labor Code declares that the opportunity to seek, obtain and hold employment without discrimination on the basis of physical handicap is a civil right. Section 1420 declares it to be an unlawful employment practice for an employer to refuse to hire a person because of his physical handicap. Section 1422.2(b) authorizes civil suit in the Superior Courts of the State of California to enforce rights under the Fair Employment Practices Act.

15. Section 11135 of the California Government Code provides that no person shall be denied the benefits of or subjected to discrimination on the basis of physical handicap in any program or activity receiving state funds.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

16. On or about July 24, 1978, Plaintiff filed a complaint with the U.S. Department of Health, Education and Welfare alleging employment discrimination on the basis of physical handicap against Atascadero State Hospital. On or before May 4, 1979, HEW determined that defendant ATASCADERO STATE HOSPITAL had discriminated against Plaintiff in violation of § 504 of the Rehabilitation Act. HEW's attempts to obtain voluntary compliance have been unsuccessful. More than 180 days have elapsed since HEW made its finding that defendant ATASCADERO STATE HOSPITAL discriminated against Plaintiff; more than one year has elapsed since plaintiff filed his administrative complaint and he has secured no relief for his innuries.

17. On June 12, 1978, plaintiff filed a complaint with defendant ATASCADERO STATE HOSPITAL alleging employment discrimination on the basis of physical handicap in violation of California Labor Code § 1420 and 29 U.S.C. § 794.

18. On or about July 24, 1978, plaintiff filed a complaint with the Fair Employment Practices Commission, alleging employment discrimination by defendant ATASCADERO on the basis of his physical handicap in violation of California Labor Code § 1420.

19. On February 1, 1979, the Fair Employment Practices Commission issued a "right to sue" letter regarding plaintiff's complaint, entitling plaintiff to bring a civil action in Superior Court pursuant to California

Labor Code § 1422.2(b). Said civil action must be initiated within one year from the date on the letter.

20. On or about July 24, 1978, plaintiff filed a complaint with the State Personnel Board alleging employment discrimination on the basis of physical handicap against Atascadero State Hospital. On August 4, 1978, an employee of the State Personnel Board informed plaintiff's counsel that they should request a formal hearing before the State Personnel Board-Appeals Division; and that said request should include documentation that conciliation efforts with Atascadero State Hospital had been unsuccessful in resolving the complaint. Plaintiff requested a formal hearing pursuant to the State Personnel Board's instructions on September 7,

1978. No action has been taken on plaintiff's request.

21. California Government Code Section 1867.1 provides that the State Personnel Board's consideration and decision on appeals shall not exceed a six months period. Failure by the Board to render a timely decision constitutes exhaustion of administrative remedies.

NEED FOR DECLARATORY RELIEF

22. An actual controversy has arisen and now exists between plaintiff and defendants relating to their respective rights and duties. Plaintiff contends and defendant denies that plaintiff is fully qualified to perform the duties of a graduate student assistant despite his physical handicap violates 29 U.S.C. § 794, the California Fair Employment Practices Act, California Labor Code

§ 1420 et seq.; and California Government Code § 11135. Plaintiff desires a declaration of his rights with respect to this controversy.

NEED FOR INJUNCTIVE RELIEF

23. Plaintiff has been and continues to be irreparably harmed as a direct and proximate result of defendants acts in that he has been unable to complete the field experience requirement for his recreation administration degree for Cal State San Luis Obispo, his graduation has been delayed indefinitely, he has lost income and has been required to remain on Social Security Disability Insurance and he has been unable to obtain employment in his chosen profession. Plaintiff has no plain, speedy or adequate remedy at law for this harm.

FIRST CAUSE OF ACTION

24. Plaintiff incorporates by reference and realleges all of the allegations contained in paragraphs 1 through 23 above.

25. 29 U.S.C. § 794 prohibits any program or activity which receives any financial assistance from the federal government, including those programs or activities of defendant, from discriminating against any person on the basis of his physical handicap.

26. Defendants' actions in refusing to hire plaintiff as a graduate student assistant were based on his physical handicap and therefore violated 29 U.S.C. § 794.

SECOND CAUSE OF ACTION

27. Plaintiff incorporates by reference and realleges all of the allegations contained in paragraphs 1 through 23 above.

28. This cause of action involves a common nucleus of operative facts. Plaintiff requests the court to accept and exercise pendent jurisdiction for the convenience of the parties and the sound allocation of judicial resources.

29. Section 1420(a) of the California Labor Code provides, inter alia, that it shall be an unlawful employment practice for an employer to refuse to hire any person because of his physical handicap.

30. Defendants' actions in refusing to hire plaintiff as a graduate student assistant because of plaintiff's

physical handicaps violate California Labor Code § 1420(a).

THIRD CAUSE OF ACTION

31. Plaintiff incorporates by reference and realleges all of the allegations contained in paragraphs 1 through 23 above.

32. This cause of action involves a common nucleus of operative facts. Plaintiff requests the court to accept and exercise pendent jurisdiction for the convenience of the parties and the sound allocation of judicial resources.

33. California Government Code § 11135 prohibits any program or activity which receives any financial assistance from the State of California, including those programs or activities of defendants, from discriminating against any person on the basis of his physical handicap.

34. Defendants' actions in refusing to hire plaintiff as a graduate student assistant were based on plaintiff's physical handicap and therefore violate California Government Code § 11135.

WHEREFORE, plaintiff prays that this Court:

1. Issue a preliminary and permanent injunction requiring defendants to employ plaintiff in a comparable position to the one for which he was rejected which will satisfy his field experience requirement for his recreation administration degree;

2. Declare that defendants' actions in refusing to hire plaintiff as a graduate student assistant violated 29 U.S.C. § 794, California Labor Code § 1420(a) and California Government Code § 11135.

3. Award plaintiff monetary damages for lost salary with interest, all fringe benefits and all civil service rights from the time that he would have been employed by for defendants' unlawful discrimination;

4. Aware plaintiff any further compensatory damages;

5. Award plaintiff his costs in bringing this action;

6. Award plaintiff reasonable attorney's fees;

7. Award plaintiff such other relief as the Court deems proper.

Dated: November 19, 1979

Respectfully submitted,

MARILYN HOLLE
MARY-LYNNE FISHER,
members of the
WESTERN LAW CENTER
FOR THE HANDICAPPED

by: _____
MARY-LYNNE FISHER

Attorneys for
Plaintiff

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 79 04523 MrP (Kx)

DOUGLAS JAMES SCANLON,

Plaintiff,

v.

ATASCADERO STATE HOSPITAL,
CALIFORNIA DEPARTMENT OF MENTAL HEALTH,

Defendant.

TO: DOUGLAS JAMES SCANLON and his attorney MARY-LYNNE FISHER:

PLEASE TAKE NOTICE that the undersigned will move this court, in Courtroom 20, United States Courthouse, 312 North Spring Street, Los Angeles, California, on January 28, 1979, at 9:30 a.m., or as soon thereafter as counsel may be heard, for an order pursuant to Rule 12(b) of the Rules of Civil

Procedure dismissing said action on the grounds that:

1. The court lacks jurisdiction over the person of the named defendant.

2. The complaint fails to state a claim upon which relief can be granted.

This motion will be based upon the papers and files in said matter, the Notice of Motion and Points and Authorities in support thereof, and upon any matter of which the court may take judicial notice.

DATED: December 31, 1979

GEORGE DEUKMEJIAN,
Attorney General
ANNE S. PRESSMAN,
JAMES E. RYAN,
Deputy Attorneys General

By_____
JAMES E. RYAN
Deputy Attorney General
Attorneys for Defendant
State Department of Mental
Health, State of California

POINTS AND AUTHORITIES

I

PRELIMINARY STATEMENT

A. Facts

In brief, the instant Complaint for Violation of Civil Rights alleges that plaintiff is a sufferer of diabetes mellitus and diabetic retinopathy, the latter resulting in total loss of vision in one eye. (Complaint, ¶ 6.)

On or about February 6, 1978 plaintiff applied to defendant Atascadero State Hospital for a half-time position as a graduate student assistant in recreation therapy. (Complaint, ¶ 8.) After submission to a medical examination, plaintiff was denied said position. (Complaint, ¶ 10, 11.)

B. Theories of Recovery

Plaintiff contends that defendant's declination to employ him in the light of his medical and physical disabilities violates several laws pertaining to employment of the handicapped, to wit:

1. Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794). [A copy of this statute is annexed hereto as "Attachment A."] . . . First Cause of Action.

2. Section 1420(a) of the California Labor Code (Fair Employment Practices Act, Labor Code § 1411 et seq.) [A copy of section 1420(a) is annexed hereto as "Attachment B."] . . . Second Cause of Action.

3. Section 11135 of the California Government Code. [A copy of this section is annexed hereto as

"Attachment C."] . . . Third Cause of Action.

C. Relief Sought

Under each of his three purported causes of action plaintiff seeks (a) retrospective and prospective compensatory damages, (b) mandatory injunctive relief and (c) declaratory judgment.

D. Bases for Federal Jurisdiction

Plaintiff relies on four grounds for satisfaction of federal jurisdictional requirements: (a) 28 U.S.C., section 1331(a), (b) 28 U.S.C., section 1343(3) and (4), (c) 29 U.S.C., sections 794 and 795, and (d) 28 U.S.C., sections 2201 and 2202.

Plaintiff concedes (Complaint, para. 28, 32) that for jurisdictional purposes the alleged SECOND and THIRD causes of

action rest solely on the permissive doctrine of pendent jurisdiction.

II

THE ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BARS SUIT IN FEDERAL COURT AGAINST THE STATE OF CALIFORNIA AND ITS DEPARTMENTS

In 1973 the United States Supreme Court reaffirmed the rule that suit in federal court by a private party seeking to impose a liability which must be paid from state treasury funds is barred by the Eleventh Amendment. (Edelman v. Jordan, 415 U.S. 651.)

That case was a class action for injunctive and declaratory relief pertaining to what plaintiffs claimed were improper practices by state officials in administering the federal-state programs of Aid to the Aged, Blind and Disabled. The named defendants were

the state officials who were alleged to have engaged in such practices. Neither the involved state nor any of its agencies were parties.

The district court issued a permanent injunction requiring not only prospective compliance with federal program requirements but also ordering the defendant officials to remit benefits retroactive for almost three years to otherwise eligible applicants. On appeal, the Circuit Court affirmed.

The Supreme Court granted certiorari and reversed, holding that the retroactive award of benefits was barred by the Eleventh Amendment, which reads:

> "The judicial power of the United States shall not be construed to extend to

> any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

The immunity provided by the Amendment has been extended consistently to bar suits brought in federal courts by a state's own citizens as well as by citizens of another state. (See, e.g., Employees v. Missouri Public Health Department (1973) 411 U.S. 279.)

The court granted certiorari in Edelman in order to resolve apparent confusion over the continuing vitality of states' sovereign immunity under the Eleventh Amendment. Consequently, in an

effort to dispel any such doubt the Court iterated in succinct fashion:

> "Thus the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment. (Citing cases.)" (Insert added.) (415 U.S. at p. 663.)

Even though the State of California, per se, is not a named defendant in the present case, the Court in Edelman laid to rest any attempted form-over-substance argument based on the titular designation of a defendant:

> "It is also well established that even

though a State is not named a party to the action, the suit may nonetheless be barred by the Eleventh Amendment. In Ford Motor Co. v. Department of Treasury 323 U.S. 459 (1945), the Court said: 'When the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.' Id., at p. 464."

(415 U.S. at p. 663.)

Of course, a state can waive its sovereign immunity but the Edelman decision is instructive on this point also.

> "In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated by the most express language or 'by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'" (415 U.S. at p. 673.)

While plaintiff at bar alleges (Complaint, para. 5) that defendant Atascadero State Hospital is a recipient

of federal financial assistance under the federal Rehabilitation Act, that fact or allegation alone is not sufficient to constitute a waiver of immunity.

> "The mere fact that a State participates in a program through which the Federal Government provides assistance for the operation by the State of a system of public aid is not sufficient to establish consent on the part of the State to be sued in the federal courts." (Id., at p. 673.)

Lastly, in Edelman the Court upheld the prospective injunctive relief portion of the district court's judgment

insofar as it compelled state officials to amend their practices. The Court was careful, however, to point out that the availability of a remedy in prospective relief against officials did not create a concomitant right against the State itself. (415 U.S. at pp. 676-677.)

This latter principle was made abundantly clear by the Supreme Court's opinion in Alabama v. Pugh, (1978) 438 U.S. 781. There, the district court had issued a mandatory injunction against the State of Alabama and its Board of Corrections, together with a number of state prison officials, ordering the adoption of various measures designed to eradicate alleged cruel practices in prison.

In reversing that portion of the lower court's injunction as it related

to the State of Alabama and its Board and ordering dismissal of those two defendants, the Court stated simply:

> "There can be no doubt, however, that suit against the State and its Board of Corrections is barred by the Eleventh Amendment, unless Alabama has consented to the filing of such a suit. (Citing Edelman, supra, and others.)" (Insert added.) (438 U.S. at p. 782.)

Notwithstanding the treatise on the sovereign immunity issue provided by the Edelman v. Jordan, supra, decision, and the terse recapitulation thereof in Alabama v. Pugh, supra, the Supreme Court nevertheless found it necessary

just nine months ago to again restate the viability and breadth of the immunity doctrine.[1]

In Quern v. Jordan, (1979) 440 U.S. 332, sub nom. Edelman v. Jordan, the defendant state officials had been ordered on remand to send notices to past applicants for aid informing them that state administrative remedies existed to determine if such applicants had been wrongfully denied benefits. Since the effect of such a notice would impact state treasury funds, the officials argued that the new order violated the Eleventh Amendment and Edelman v. Jordan, supra.

1/ This need was apparently occasioned by recent efforts at misapplication of the decision in Monell v. New York City Dept. of Social Services, (1978) 436 U.S. 658, wherein it was held that a City could not don the cloak of immunity furnished by the Eleventh Amendment.

While recognizing that the new order-notice might well create liability against the state treasury, the Supreme Court refused to dissolve it, explaining that the entitlement to and amount of any monetary liability would be the result of state not federal court action. (440 U.S. at p. 348.) Before proceeding to dispose of the foregoing issue, the Court made certain that its holding in Edelman and its ilk remain unaltered:

> "...[R]espondent suggests that our decision in Edelman has been eviscerated by later decisions such as Monell v. City of New York Dept. of Social Services, (1978) 436 U.S. 658... As we have noted above, we held in Edelman that

in 'a [42 U.S.C.] § 1983 action... a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief, Ex Parte Young, supra, and may not include a retroactive award which requires the payment of funds from the state treasury, Ford Motor Co. v. Department of Treasury, supra.' 415 U.S., at 677. We disagree with respondent's suggestion. This Court's holding in Monell was 'limited to local government units which are not considered part of the State for Eleventh Amendment purposes,' 436 U.S.,

at 690 n. 54, and our Eleventh Amendment decisions subsequent to Edelman and to Monell have cast no doubt on our holding in Edelman. See Alabama v. Pugh, (1978) 438 U.S. 781 . . ." (440 U.S. at pp. 338-339.)

Moreover, while there are instances when a state may have waived its sovereign immunity or may be deemed to have consented to suit in federal court, plaintiff in the case at bar can point to no such circumstance. Plaintiff's only alleged federal claim is founded upon a purported violation of 29 U.S.C. section 794. (See "Attachment A.") 29 U.S.C. section 794a (a) (2) (a copy of which is annexed hereto as "Attachment D") provides, inter alia, that a person aggrieved under section 794 shall have

available to him/her the remedies set forth in Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d, et seq.). (A copy of 42 U.S.C. § 2000d is annexed hereto as "Attachment E.") Since plaintiff's litigation rights in federal court rest on Title VI, then, it would be necessary for him to demonstrate that California has waived its Eleventh Amendment immunity for purposes of Title VI actions or that this shield has been abrogated by Congressional enactment.

Courts historically have looked at the specific piece of civil rights legislation in question to determine the availability of a remedy in federal courts against states. In keeping with the caveat in Edelman, however, that a waiver of immunity will be found only

where stated in the most express language or compelled by overwhelming implication (415 U.S. at p. 673), courts have been loathe to find such waiver and, in fact, have refused to do so. (See, e.g., Edelman v. Jordan, supra [42 U.S.C. § 1983]; Employees v. Missouri Public Health Dept., 411 U.S.C. 279 (1973) [re 29 U.S.C. §§ 201-219]; Boreta v. Kirby, 328 F.Supp. 670 (1971, N.D. Cal.) [re 42 U.S.C. §§ 1383 and 1385].)

One instance in which the Eleventh Amendment provided no bar to suit arose in Fitzpatrick v. Bitzer (1975) 427 U.S. 445. That case involved a class action employment discrimination claim under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, et seq.) against the director of Connecticut's State Employees Retirement System in

which plaintiffs sought, among other things, an award of retroactive retirement benefits. The director (state) unsuccessfully urged sovereign immunity under the Eleventh Amendment and cited Edelman v. Jordan, supra, in support thereof. The immunity argument failed in the context of this case, however, in view of express language found in 42 U.S.C. section 2000e(a). (A copy of 42 U.S.C. § 2000e(a) is annexed hereto as "Attachment F.") That subsection of Title VII specifically includes governmental agencies, etc., within the definition of "persons" against whom employment discrimination actions may be brought. This creation of new state liability was effected by § 2 (1) of the Equal Employment Opportunity Act of 1972 (86 Stat.

103.) The Court in Fitzpatrick then found that the power of Congress to subject states to liability pursuant to section 5 of the Fourteenth Amendment supersedes and abrogates any sovereign immunity provided by the Eleventh Amendment.

In contrast, there is no such language contained in the Civil Rights legislation, Title VI, here at issue. 42 U.S.C. section 2000d (see "Attachment E") retains its original language with respect to the class of potential defendants. All of the cases which have considered the question of whether states or their departments are proper parties defendant in Title VI federal court actions have adhered to the doctrine of sovereign immunity under the Eleventh Amendment. (See Wade v. Mississippi Co-Op. Extension Service,

528 F.2d 508 (1976 5th Cir.), on remand 424 F.Supp. 1242 (1976, N. D. Miss.); Gilliam v. City of Omaha, 388 F.Supp. 842 (1975, D. Neb.).

Furthermore, the overwhelming implication with regard to Title VI suits is that states and their agencies are not intended to be defendants in such private actions in federal court. This inference is compelled by the fact that had Congress intended otherwise it could have (a) amended 42 U.S.C. section 2000d, as it did section 2000e, to expressly include state governmental entities within the scope of proper defendants, or (b) provided for state liability in the original or amendatory language of 29 U.S.C. section 794a (a)(2), or (c) chosen to avail parties aggrieved under section 794a of the

broader remedies of Title VII rather than the restrictive scope of Title VI.

In summary, therefore, in the light of the Eleventh Amendment and the continued embracing of its immunity in Edelman, Pugh and Quern, plaintiff has not and cannot state a claim, whether in monetary, injunctive or declaratory relief, against the State of California, its Department of Mental Health, or Atascadero State Hospital.

III

PLAINTIFF HAS FAILED TO PLEAD AN ESSENTIAL ELEMENT OF A CAUSE OF ACTION UNDER 29 U.S.C. 794

Defendant recognizes that actions under the federal rehabilitation act of 1973 (29 U.S.C. § 794a) are in an embryonic stage. Nevertheless, one case has delineated at least one of the requirements for successfully pleading a

cause of action under the Act. In Trageser v. Libbie Rehab. Center, Inc., 590 F.2d 87 (1978, 4th Cir.), cert. den. 99 S.Ct. 2985, it was held:

> "A private action under § 504 to redress employment discrimination therefore may not be maintained unless a primary objective of the federal financial assistance is to provide employment. There has been no such allegation in this case; nor could there be one." (Emphasis added.) 590 F.2d, p. 89.

The court in Trageser based the above holding on the language found in section 604 of Title VI (42 U.S.C. § 2000d-3, a copy of which is annexed hereto as Attachment G), which provides:

> "Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment."

Other than the mere assertion in paragraph 5 of the complaint that defendant "is a recipient of federal financial assistance," plaintiff makes no reference as to the nature of such assistance and, specifically, does not

allege that the purpose of such assistance is to provide employment. Consequently, as in Trageser, supra, plaintiff's claim under 29 U.S.C. section 794a should be dismissed.

IV

CONCLUSION

For the foregoing reasons, defendant respectfully requests that this Court order the within action dismissed in its entirety.

DATED: December 31, 1979

GEORGE DEUKMEJIAN,
Attorney General
ANNE S. PRESSMAN,
JAMES E. RYAN,
Deputy Attorneys General

By_____
JAMES E. RYAN
Deputy Attorney General
Attorneys for Defendant
State Department of Mental
Health, State of California

[Attachments and jurat omitted.]